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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-647

JAMES E. SIMON CO., INC., Petitioner

v.

ARDELT-HORN CONSTRUCTION CO.
and
ST. PAUL FIRE & MARINE INSURANCE COMPANY,
Respondents

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-647

JAMES E. SIMON CO., INC., Petitioner

v.

ARDELT-HORN CONSTRUCTION CO. and ST. PAUL FIRE & MARINE INSURANCE COMPANY, Respondents

---

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals below is reported at 446 F.2d 820.

QUESTION PRESENTED

Respondent St. Paul Fire and Marine Insurance Company ("Respondent" or "St. Paul") believes that the questions presented by Petitioner James E. Simon Co., Inc. ("Petitioner" or "Simon") do not fairly comply with Rule 23(c), and therefore sets forth the question presented and decided by the Courts below:

Whether a subcontractor who has furnished and paid for labor and material upon a government construction contract upon which both the performance bond and payment bond required by the Miller Act have been furnished is entitled to recover on the performance bond for the cost of such labor and material which has not been paid to him.

STATEMENT OF THE CASE

Respondent believes that Petitioner's Statement of the Case does not fairly comply with Rule 23(e) and (g) and therefore sets forth its own statement as follows:

A. MATERIAL FACTS

The material facts are the allegations contained in Petitioner's Complaint (A. 4-20) and are set out as follows [the Appendix referred to is the printed Appendix forwarded to this Court by the Clerk of the Court of Appeals below]:

Petitioner is a Nebraska corporation engaged in the business of general and highway construction (A. 4). Respondent Ardelt-Horn Construction Co. ("Ardelt-Horn") is a Colorado corporation which as the prime contractor entered into a construction contract with the United States of America for the construction of certain bituminous pavement and railroad track at Cornhusker Army Ammo Plant near Grand Island, Nebraska (A. 4-5).

St. Paul is a Minnesota corporation (A. 11) which was surety for Ardelt-Horn as principal on the performance bond required of Ardelt-Horn by Title 40 U.S.C. Sec. 270a (A. 15). St. Paul was also surety for Ardelt-Horn as principal on the payment bond required of Ardelt-Horn by Title 40 U.S.C. Sec. 270a (A. 11). Although not specifically pleaded as a separate allegation by Simon, the amount of the payment bond, $206,502.50 (R. 3), was less than the amount of $331,204 claimed for labor and material by Simon (A. 18).

Ardelt-Horn and Simon entered into a written subcontract under date of February 12, 1968 (A. 5), an additional written subcontract under date of September 23, 1968 (A. 7), and several oral agreements of unspecified dates (A. 9), all whereby Simon was to perform substantial work and furnish substantial labor and material to Ardelt-Horn in the performance of the prime contract (A. 5-9). On or about December 20, 1968, the United States of America terminated the right of Ardelt-Horn to proceed

with the work on the prime contract (A. 5). As of the time of termination, Simon had substantially performed the two subcontracts and the several oral agreements, Simon was not in default on its various subcontracts and oral agreements, but Ardelt-Horn refused to pay Simon (A. 5-10).

B. JURISDICTION BELOW

In its Complaint and the Third Claim thereof, Petitioner alleged that jurisdiction for the claim against the performance bond was conferred by Title 40 U.S.C. Section 270(b) and (c) [sic] and by Title 28 U.S.C. Sections 1332 and 1352 (A. 14). By way of its brief in the Court of Appeals below, Respondent St. Paul argued that none of the U.S.C. Sections cited by Petitioner conferred the requisite jurisdiction for suit on the performance bond. Respondent St. Paul does not here concede that there was or is any basis for federal jurisdiction in the court of first instance for the action of Petitioner against the performance bond.

C. PROCEEDINGS BELOW

The proceedings below are fully and fairly reflected in the District Court opinion at 316 F. Supp. 254 and the Court of Appeals opinion at 446 F.2d 820.

D. STATUS OF PETITIONER

In the District Court, Petitioner brought the action against the performance bond both in the name of the United States as a use-plaintiff and in its individual capacity (A. 14). Petitioner then took its appeal to the Court of Appeals below in this dual capacity (A. 41). In its petition to this Court, Petitioner appears only in its individual capacity (Pet. 1).

GROUNDS FOR REFUSING CERTIORARI

ARGUMENT

THE DECISION OF THE COURT OF APPEALS BELOW IN REAFFIRMING THE SETTLED FEDERAL QUESTION THAT THE REMEDY OF ONE SUCH AS PETITIONER IS RESTRICTED TO THE MILLER ACT PAYMENT BOND IS IN COMPLETE HARMONY WITH THE LANGUAGE AND LEGISLATIVE INTENT OF THE MILLER ACT; FOLLOWS THE APPLICABLE DECISIONS OF THIS COURT; AND IS IN FULL ACCORD WITH EVERY OTHER COURT OF APPEALS WHICH HAS CONSIDERED ANY ASPECT OF THE QUESTION.

A. The language employed in the Miller Act and its legislative history both have left no doubt that the payment bond created by the Act was for the sole use and protection of those providing labor and material on government

> contracts, and that the performance bond created by the Act was for the sole use and protection of the government.

The District Court below in several pages of analysis (A. 35-39) of the language and legislative history of the Miller Act concludes that neither the language nor history of the Act "mirrors an intent that suppliers of labor and material should have rights under the performance bond" (A. 39).

The Court of Appeals below agrees with the analysis of the District Court that the clear language of the Miller Act, fully supported by the legislative history, provides no basis for suit by Petitioner against the performance bond (R. 2). No other conclusion or finding is possible when the problem undertaken of resolution by Congress in passing the Miller Act is analyzed.

The problem facing Congress was that under the Heard Act, Act of August 13, 1894, Ch. 280, 28 Stat. 278, as amended by Act of February 24, 1905, Ch. 778, 33 Stat. 811, 40 U.S.C. Sec. 270 [set out in the report in Addendum hereto], subcontractors were complaining of undue delay and hardships in collecting money in suits on the single Heard Act bond. H. Rep. No. 1263, 74th Cong. 1st. Sess. [set out in Addendum hereto]. As this Court also noted in MacEvoy Company v. United States, 322 U.S. 102, f. 4 at 107, 64 S. Ct. 890, f. 4 at 893, 88 L. Ed. 1163 (1944), the

government had the sole right for six months to sue on the single bond form, after which the labor and material claimants could join in which resulted in serious inconveniences and delays. The Miller Act solution to the problem was to create two bonds, a performance bond for the protection of the government, and a payment bond for the protection of those providing labor and material to government contracts.

In full knowledge of the existing procedures under the Heard Act whereby the government had priority to the proceeds of the bond and other claimants had to wait until six months after completion of the work to institute suit on the single bond (H. Rep. 1263), Congress undertook to set up a new procedure for suit on the separate payment bond. The jurisdictional authorization for the respective United States District Courts to entertain such suits; the right to bring such suits in the name of the United States as use-plaintiff; and the time, notice and forum requirements for such suits on the payment bond were all set out by Congress in Sec. 270b of the Miller Act and nowhere else. It is worthy of note that the words "payment bond" appear four times in Sec. 270b, the word "bond" does not appear by itself in Sec. 270b but is always preceded by the adjective "payment," and that the words "performance" or "performance bond" do not appear anywhere in Sec. 270b. Such specificity simply leaves no room to argue that Congress contemplated allowing laborers and materialmen to bring suit on the performance bond.

However, Petitioner seems to argue in its Petition that the Miller Act simply added the payment bond to the existing single bond under the Heard Act (Pet. 5, F. 3), that the only motivation of Congress in passing the Miller Act was to strengthen the security rights of unpaid laborers and materialmen, and that therefore both the former Heard Act bond and the Miller Act payment bond are now available for suit by Petitioner. For Petitioner's argument to have any substance, this Court would have to find that the Miller Act, sub silentio, gave a right of action to one such as Petitioner on the performance bond without according or detailing the obvious priority of the United States on such performance bond, without according the respective United States District Courts any jurisdiction to entertain such suits, without setting any time limit for bringing such suits, and without specifying any required forum for the suits. This Court long ago recognized the intent of Congress to strengthen the rights of laborers and materialmen in the Miller Act but not in the strained fashion advocated by Petitioner when it noted in MacEvoy:

> "Creditors can sue on the latter bond without waiting for the Government and even without waiting for completion of the project." (f. 4 at page 893, 64 S. Ct.)

To allow the contention of Petitioner would be to subvert the Miller Act and would lead to the species of "absurd results" rejected by this

Court in MacEvoy when it refused to make a finding

> "contrary to the clear language of the proviso and to the expressed will of the framers of the Act." (at page 894, 64 S. Ct.)

B. The decisions of this Court which have reviewed or touched upon Miller Act procedures have recognized without exception the principle that the right of action accorded to unpaid laborers and materialmen lies only against the payment bond, and no decision including Pearlman, infra, has directly or indirectly assumed or announced a contrary principle.

There can be no question that the Court of Appeals below has followed the decisions of this Court applicable to Miller Act procedures. Admittedly, this Court in cases such as United States v. Munsey Trust Co., 332 U.S. 234, 67 S. Ct. 1599, 91 L. Ed. 2022 (1947), and Pearlman v. Reliance Insurance Company, 371 U.S. 132, 83 S. Ct. 232, 9 L. Ed. 2d 190 (1962), has not tarried on the procedural aspects of the Miller Act as it went to the central issue of the respective cases. In these two cases, for example, this Court simply accepted as a basic and obvious premise not requiring extended discourse that when the question of the right of payment for labor and material under the Miller

Act is being discussed, the procedure to enforce that right lies under the payment bond as Congress had specified that it should lie. This point is best illustrated by Pearlman when the Court, after mentioning the separate bonds, takes an added clause in a sentence to point out the obvious separate purposes of the two bonds:

> "It is true that the Miller Act did require both a performance and an additional payment bond, that is, one to assure completion of the contract and one to assure payments by the contractor for the materials and labor." (at page 236, 83 S. Ct.)

The plain truth is that the language of the Miller Act which spells out in detail the procedure whereby the unpaid laborers and materialmen may have redress under the payment bond is too obvious to admit of any other construction. This is not to sacrifice substance for procedure but since Congress created the right of action, it follows that Congress may also set up the required procedures which must be followed by those who would invoke the right of action so created. As stated in the First Circuit case of American Auto Insurance Company v. United States, 269 F.2d 406:

> "A suit under the Miller Act does not depend on diversity of citizenship but is a special, federal right of action limited to the federal court.[1]" [footnote cites 40 U.S.C.A. Sec. 270b(b)] (at page 408)

There is an aspect other than procedural of the question as to whether the Court of Appeals below is in conflict with an applicable decision of this Court. Petitioner all but abandoned its argument of a procedural right of action against the performance bond when it recognized its untenable position as a use-plaintiff and simply took its Petition to this Court in its individual capacity. In this capacity Petitioner now argues, as it did below, that it has a derivative right of equitable subrogation under color of the Miller Act. The recurring theme of its Petition is that Pearlman accorded one such as Petitioner an equitable right of subrogation to the rights of the government, and that the Courts below did not follow Pearlman (Pet. 6, 7, 9-15).

In trying to read into Pearlman what is not there, Petitioner is trying to make the words "equitable right to be paid" synonymous and interchangeable with the words "equitable right of subrogation." This Court made no such pronouncement in Pearlman, nor for that matter in any other case, for to do so would ignore the basic principles of law which are the roots of subrogation. As stated by the First Circuit in National Shawmut Bank v. New Amsterdam Casualty Co., 411 F.2d 843 (1969):

> "Subrogation is an old term, rooted in equity, and semantically stemming from words meaning 'ask under.' Today we use the parallel phrase, 'stand in the shoes of.' The equitable principle is that when one, pursuant to obligation-not a

volunteer, fulfills the duties of another, he is entitled to assert the rights of that other against third persons." (at page 844)

As noted in the Statement of Facts herein, Petitioner furnished substantial labor and material to the prime contract under its various agreements with the prime contractor, and the prime contractor breached the said agreements by refusing to pay Petitioner. Petitioner does not argue, nor could it, that its subcontractual agreements with the prime contractor gave rise to a contractual relationship between the United States and Petitioner, or that Petitioner had any duty to the United States. The principle that there is no express or implied contract between the United States and subcontractors on government work is firmly established. United States v. Blair, 321 U.S. 730, 737, 64 S.Ct. 820, 824, 88 L.Ed. 1039 (1944). The subcontractor is not a party to the government contract and is obligated only to perform its contract with the prime contractor without fault. United States v. Cleveland Electric Co., 373 F.2d 585 (4th Cir. 1967).

Petitioner complains that the Courts below refused to accept the premise that "Petitioner by performing the work discharged the performance obligation of the prime contractor to the government" (Pet. 11). This premise has the obvious defects that Petitioner had no obligation to perform its subcontracts in the face of the prime contractor's refusal to pay and that Petitioner was actually performing as a volunteer. However, assuming arguendo that the said

premise has substance, then by discharging the performance obligations of the prime contractor, Petitioner would stand in the shoes of the prime contractor and would be entitled to assert the rights of the prime contractor against third persons.

To ask the question as to what rights the prime contractor who had failed to pay for labor and material had against the surety on either its own performance bond or its own payment bond is to answer the question as to what rights against the same surety the Petitioner succeeded to. The right succeeded to against the performance bond was non-existent; the right of the Petitioner against the payment bond existed without the necessity of succession or subrogation.

As to rights against the government, Pearlman explicitly detailed what other right Petitioner would have succeeded to had there been any retained funds in the hands of the government:

> "We therefore hold in accord with the established legal principles stated above that the Government had a right to use the retained fund to pay laborers and materialmen: that the laborers and materialmen had a right to be paid out of the fund; . . . ." (at page 237, 83 S. Ct.)

However, as noted by both Courts below, Petitioner makes no claim to withheld or retained funds in the hands of the government.

Finding that the shoes of the prime contractor offer it little comfort, Petitioner argues that, in reality, it is in the shoes of the government, a species of jumping back and forth decried in Munsey (at page 1603, 67 S. Ct.). The Court of Appeals below took note of the fallacy of this argument when it pointed out that Petitioner "has paid no debt that the United States was obligated to pay" (R. 2, 3), from which it follows that Petitioner is not a subrogee of the government. Petitioner accuses the Court of Appeals below of having "curiously juxtaposed" (Pet. 11, f. 15) the United States in the foregoing quotation but the Court of Appeals was simply reciting the same basic principles of subrogation which it was necessary for Petitioner to advocate in its effort to stand in the shoes of the prime contractor. To stand in the shoes of the government by right of subrogation, Petitioner would have had to fulfill some duty of the government and this, Petitioner did not do.

The decision of the Court of Appeals below follows both the procedural and substantive law announced by this Court in Pearlman and all other applicable decisions.

C. Every Court of Appeals which has reviewed or touched upon Miller Act procedures has recognized without exception the principle that the right of action accorded to unpaid laborers and materialmen lies only against

the payment bond, and such decisions follow the decisions of this Court.

In addition to the decision of the Court of Appeals below in this case, the decisions of other Courts of Appeal and of the Court of Claims leave no doubt that they are not in conflict with each other, and that they follow the decisions of this Court in recognizing the procedures required by the Miller Act for suit by unpaid laborers and materialmen. This understanding and unanimity is reflected in the following representative cases: United Pacific Insurance Co. v. The United States, 319 F.2d 893 (Ct. Cl. 1963); United States v. Aetna Casualty & Surety Company, 297 F.2d 665 (2nd Cir. 1962), Annot., 100 A.L.R. 2d 451 (1965); Western Casualty and Surety Co. v. Brooks, 362 F.2d 486 (4th Cir. 1966); Warrior Constructors Inc. v. Harders, Inc., 387 F.2d 727 (5th Cir. 1967); Fanderlik-Locke Co. v. United States, 285 F.2d 939 (10th Cir. 1960). The foregoing representative cases fully demonstrate the proposition that the rights of unpaid laborers and materialmen under the Miller Act are settled questions of federal law about which there is no conflict among the several Courts of Appeal. The dire consequences for the future which Petitioner predicts (Pet. 8, 9) should the decision of the Court of Appeals below be allowed to stand have had, in reality, sufficient time to develop since the passage of the Miller Act in 1935, but have not materialized. In the some thirty-six years since the passage of the Act, the single District Court

case cited by Petitioner in support of his contention (Pet. 6, f. 8) stands absolutely alone and has been later rejected by another District Court (Pet. 6, f. 7).

It is a settled question of federal law that unpaid laborers and materialmen do not have a right of action against the Miller Act performance bond.

CONCLUSION

No reasons having been shown for the granting of a writ of certiorari, Respondent St. Paul prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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ADDENDUM

74TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 1263

BONDS OF CONTRACTORS ON PUBLIC WORKS

JUNE 19, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. MILLER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 8519]

The Committee on the Judiciary, having considered H. R. 8519, requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work, reports the same favorably to the House with the recommendation that it do pass.

This proposed legislation supersedes the Heard Act, which it repeals, dealing with bonds of contractors on public works. After considerable complaint with regard to the working of the Heard Act had come to the Committee on the Judiciary, particularly from subcontractors who have experienced in many cases what seems to your committee to be undue delay, with resultant hardships, in the collection of moneys due them by suits on bonds under the procedure prescribed by the Heard Act, the committee appointed a subcommittee to consider all of a number of proposed amendments which had been introduced in the House and referred to the committee. Extensive hearings were held by the subcommittee, at which representatives of contractors, surety companies, and the Government were heard.

The Treasury Department expressed its accord with the purpose sought to be accomplished in the following language contained in a letter dated March 23, 1935, addressed by the Secretary to the chairman of the committee with regard to H. R. 2068, one of the bills considered by the subcommittee, and which is superseded by the reported bill, H. R. 8519:

> The major purpose of the bill seems to be to afford greater protection to subcontractors, laborers, and materialmen by shortening the period within which action may be instituted by them against the surety. With this purpose the

Treasury Department is fully in accord, as there have been many instances in which several years have elapsed after the performance of the work before a judicial remedy was available under the existing law.

PROCEDURE WITH EXISTING LAW

The Heard Act is set out in full at the end of this report in compliance with the Ramseyer rule. It will be observed that under this act, there is but one bond provided by the contractor, which serves as protection both for the United States and for subcontractors, material men, and laborers.

If suit is brought by the United States on the bond other claimants may intervene and have their claims adjudicated, subject to the priority of the United States. If, however, no suit is brought on the bond by the United States, the claimants must wait until 6 months after the completion and final settlement of the contract before they may initiate suit. In the case of works requiring a long period of time to complete, this may mean a delay of years before the subcontractors, material men, and laborers are even permitted to bring suit on the bond, and months more of delay occur before judgment is entered. Under such circumstances it appears that claimants frequently find themselves under the necessity of choosing whether they will wait years for their money or accept compromises which, if they do not involve greater loss, at least destroy the profitableness of the contract. Those in financial stringency, of course, have no choice but the latter alternative.

PROCEDURE UNDER H. R. 8519

Under this bill the contractor on all contracts of more than $2,000 will furnish two bonds:

(*a*) A performance bond satisfactory to the officer of the Government awarding the contract in such amount as he shall deem adequate for the protection of the United States; and

(*b*) A payment bond for the protection of all persons furnishing labor or material in the prosecution of the work provided for in such contract. The amount of the payment bond is determined by the amount of the contract, as follows:

Contract:	Bond
Not more than $1,000,000	One-half of amount of contract.
Between $1,000,000 and $5,000,000	40 percent of amount of contract.
Over $5,000,000	$2,500,000.

The right to sue on the payment bond and prosecute his action to judgment and execution accrues to any person protected by the bond 90 days after the last of his labor was performed or material supplied if he has not been paid within that time. The suit must be brought in the district court of the district where the contract was to be performed and may not be commenced after the expiration of 1 year from the date of final settlement of the contract.

One protected by the bond must be vigilant in the prosecution of his rights thereunder or take the chance of finding the bond depleted by the executions of those more prompt than he, or perhaps find the door entirely closed against his suit by limitation. "Equity aids the vigilant."

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A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond.

In compliance with clause 2a of rule XIII, existing law which it is proposed to repeal is set out in full below:

UNITED STATES CODE, TITLE 40, SECTION 270

Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials: Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claim and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further*, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.